

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
10 ELLICOTT SQUARE COURT CORPORATION	:	: DETERMINATION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9 of the Tax Law for the Years 1983 and 1984.	:	

Petitioner, 10 Ellicott Square Court Corporation, 210 Ellicott Square, Buffalo, New York 14203, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the years 1983 and 1984 (File No. 803177).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on March 23, 1988 at 9:15 A.M. Petitioner appeared by Carl P. Paladino, Esq. The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that petitioner was a "second class utility" which resold electricity to its tenants and that the receipts from such sales were "gross operating income" subject to tax under Tax Law § 186-a, thereby resulting in a denial of petitioner's refund claim.

FINDINGS OF FACT

1. On May 30, 1985 petitioner, 10 Ellicott Square Court Corporation, filed with the Audit Division a letter requesting a refund of tax paid under section 186-a of the Tax Law for the months of November and December of 1983 and the entire year 1984, including a prepayment for 1985.

2. By letter dated December 9, 1985, the Audit Division denied petitioner's refund claim.

3. Petitioner is a New York corporation which acts as a managing and leasing agent of a 10-story, 300,000 square foot office building in Buffalo, New York, commonly known as the "Ellicott Square Building". Petitioner is the designated fiduciary of Ellicott Group, a general partnership which owns the Ellicott Square Building. Petitioner operates the property for the partnership and has full authority in all matters involving the operation of the property.

4. The Ellicott Square Building is a multi-tenant office building with over 125 individual tenancies. Its varied tenants include individuals, law firms, and state and local government agencies.

5. The Niagara Mohawk Power Corporation supplies electricity to the Ellicott Square

Building via one main service line. This main line of service is then broken down by the building's equipment into individual lines for each tenancy. Niagara Mohawk bills petitioner for the total amount of electricity consumed by all of the Ellicott Square Building's tenancies; that is, for the total amount of electricity which is delivered to the building via the main service line.

6. Petitioner recovers its costs for electricity consumed by the tenants in one of two ways depending upon the size of the tenancy:

a) Tenancies having less than 1,000 square feet of space pay a flat rental to petitioner which includes an estimated cost of the electricity consumed by that tenant.

b) Tenancies having more than 1,000 square feet of space are submetered by petitioner and then billed by petitioner monthly for their proportionate share of the Niagara Mohawk charge. No additional costs are charged.

7. A typical lease from the period at issue describes the submetering and sub-billing arrangement as follows:

"40. Electric current consumed for general lighting, operation of Tenant's office appliances and for the operation of air conditioning equipment shall be submetered and consumption charges paid for by the Tenant to the Landlord in the following manner: It is agreed that said electric charges shall be at Landlord's average cost per kilowatt hour which shall be determined by dividing the total cost of electricity for the building, including demand charges and taxes, excluding late charges, if any, by the total building consumption thereby producing Landlord's average cost per kilowatt hour. The Tenant's kilowatt hour consumption, as measured in the submeter, shall then be multiplied by Landlord's average cost per kilowatt hour, as determined aforesaid, thereby producing Tenant's electric charges. Landlord shall provide electric bills from the local utility company, for the building of which the demised premises forms a part, used to determine Tenant's average cost per kilowatt hour. Tenant shall have the right to accompany the Landlord or Landlord's representative during the reading of the submetering device or devices. It is further agreed and understood that no electric current consumption except that which is consumed in the demised premises shall be registered in the submetering device as used by the Tenant."

8. In addition to payments for usage of electricity, submetered tenants also pay a gross rental which does not include electric.

9. Approximately 65 percent of petitioner's tenants are submetered.

SUMMARY OF PETITIONER'S POSITION

10. Petitioner contended that because it realized no profit on its system of submetering and sub-billing the transactions between it and its tenants were not sales. Rather, petitioner contended that the billing system described herein was intended as a means by which petitioner could most equitably and fairly allocate the building's costs for electrical service.

11. Petitioner further contended that the imposition of tax upon it pursuant to Tax Law § 186-a resulted in an unfair double taxation, for petitioner's payments to Niagara Mohawk

included, in addition to the charges for electrical service, a "Gross Revenue Tax Adjustment" pursuant to Niagara Mohawk's obligations under Tax Law § 186-a. Petitioner attempted to arrange with Niagara Mohawk an adjustment in its bill by deducting the "Gross Revenue Tax Adjustment" for the portion of electricity resold by petitioner. Niagara Mohawk refused to make any such adjustments.

12. Finally, petitioner contended that 20 NYCRR 500.3(a) precluded the imposition of tax upon it under the circumstances presented herein.

CONCLUSIONS OF LAW

A. Section 186-a of the Tax Law imposes a tax upon the gross income of every utility doing business in New York which is subject to the supervision of the State Department of Public Service and a tax upon the gross operating income of "every other utility" doing business in New York. "Utility" is defined by the statute as every person subject to the supervision of the State Department of Public Service and also:

"every person (whether or not such person is subject to such supervision) who sells...electricity...delivered through...wires, or furnishes...electric...service, by means of...wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets..." (Tax Law § 186-a[2][a]).

B. 20 NYCRR 500.2 further defines the two types of utilities described above as utilities of the first and second class, respectively. Additionally, 20 NYCRR 500.2(b)(2) and (3) provide, in relevant part, the following:

"(2) Utilities in the second class are mainly those which, generally speaking, would not be classed as utilities but which are made utilities by statute for the purpose of this tax. Ordinarily, although there are exceptions, such as omnibuses, utilities in this group resell utility services which are purchased from utilities in the first class.

(3) The following questions and answers are illustrative of utilities in this class:

Question 1: Is the owner or lessee of a hotel, apartment house or office building, who purchases gas, electricity, steam, water, refrigeration or telephony and resells any part or all of the same to tenants, subject to tax? Answer: Yes.

Question 2: A tenant in a hotel, apartment house, or office building pays a lump sum as monthly rental, which includes gas, electric, steam, water and telephone services or any one or more of such services. Is the landlord subject to the tax? Answer: No. The landlord becomes taxable only if he sells one or more of such utility services at identifiable, flat or metered rates."

C. Tax Law § 186-a(2)(d) defines "gross operating income" as follows:

"[T]he words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of...electricity... or in or by reason of the furnishing for such

consumption or use of...electric...service in this state, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever."

D. The Audit Division's denial of petitioner's refund claim was proper. Contrary to petitioner's assertion at hearing, petitioner's billing of its submetered tenants at its "average cost per kilowatt hour" rate (see ___ Finding of Fact "7") constituted a sale of electricity for ultimate consumption by the purchaser thereof at an identifiable rate within the meaning of the aforementioned statute and regulations, and within the plain meaning of the word "sale". The Audit Division therefore properly determined that petitioner was a "utility of the second class" and its receipts from its sales of electricity to its tenants were "gross operating income" subject to tax under Tax Law § 186-a. Contrary to petitioner's contention, its sub-billing system did constitute a sale of electrical services, notwithstanding the intent behind the creation of the billing system or the lack of profits from the system.

E. Regarding petitioner's double taxation claim, the Tax Law provides a means by which such occurrences may be eliminated (see 20 NYCRR 501.9 and 502.3). It does not appear, however, that the Tax Law provides a mechanism to compel a utility of the first class to cooperate with a utility of the second class in order to eliminate an adjustment for taxes included in the bill.

F. Petitioner's claim that 20 NYCRR 500.3(a) precludes the imposition of tax under Tax Law § 186-a under the circumstances presented is rejected. By its plain language, this regulation refers to "charges for water" and not charges for any other utility. The reference to water in the regulation is specific and is not intended merely as an example as urged by petitioner.

G. The petition of 10 Ellicott Square Court Corporation is in all respects denied and the Audit Division's denial of refund letter, dated December 9, 1985, is sustained.

DATED: Albany, New York

September 9, 1988

/s/ Timothy J.

Alston _____
ADMINISTRATIVE LAW JUDGE